APPENDIX

Opinion of Winter, *Circuit Judge*

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

HOWARD JOSEPH WHITEHILL, JR.,

Plaintiff,

—VS.—

WILSON ELKINS, President, University of Maryland; BOARD OF REGENTS, University of Maryland; J. JEROME FRAMPTON, JR., President, State Board of Education,

Defendants.

Filed: September 8, 1966.

Before:

SOBELOFF and WINTER, *Circuit Judges,* and
THOMSEN, *Chief Judge.*

Sanford Jay Rosen, Esq., Arnold M. Weiner, Esq., Mrs. Elsbeth Levy Bothe, Joseph S. Kaufman, Esq., and Lee M. Miller, Esq., Attorneys for Plaintiff.

Thomas B. Finan, Esq., Attorney General of Maryland, Robert C. Murphy, Esq., Deputy Attorney General of Maryland, Loring E. Hawes, Esq., and Julius A. Romano, Esq., Assistant Attorneys General of Maryland, Attorneys for Defendants.

Opinion of Winter, Circuit Judge

WINTER, *Circuit Judge*:

This action, brought under the Civil Rights Act, 42 U.S.C.A. § 1983, and invoking the civil rights and declaratory judgment jurisdiction of this Court, 28 U.S.C.A. §§ 1343(3), 2201 and 2202, seeks to enjoin the oath requirements of the Maryland Subversive Activities Act of 1949, 8A Annotated Code of Maryland (1964 Ed.), Article 85A, §§ 1, *et seq.* exacted of public employees as a condition precedent to public employment. Defendants' motion to dismiss admits the facts well pleaded, which are as follows:

Plaintiff is a member of the faculty of The Johns Hopkins University, teaching creative writing, an author, and a practicing member of the religious organization known as the Society of Friends. Plaintiff was engaged as a visiting lecturer in English at the University of Maryland, College Park, Maryland, for the academic year of 1966-1967. In July, 1966, a formal contract embodying the conditions of his employment was forwarded to plaintiff. He was also forwarded a document entitled "Certification of Applicant for Public Employment," which contained a loyalty oath.[1] Plaintiff was advised that he must sign it as a condition precedent to his employment. Plaintiff executed his employment contract, but declined to execute the loyalty oath.

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[1] While this opinion uses the popular parlance "oath," technically plaintiff was required to make a written statement of his loyalty, under the penalties of perjury prescribed by 3 Annotated Code of Maryland (1957 Ed.), Art. 27, § 439. The document itself was entitled "Certification of Applicant for Public Employment" and the operative words were "I, _____ do hereby certify * * *." Article 39 of the Maryland Declaration of Rights guarantees the right of any person to affirm, rather than swear, agreeably to his religious beliefs, and 1 Annotated Code of Maryland (1957 Ed.), Article 1, § 9 implements this guarantee.

He was immediately advised by an authorized representative of the University of Maryland that that educational institution would not accept his services without the loyalty oath first having been executed by him. Plaintiff declined to sign this oath and has now brought this suit, seeking a declaration that the oath sought to be exacted from him was unconstitutional and seeking to enjoin defendants from preventing the consummation of his contract with the University of Maryland because of his failure to execute the oath.[2] Pursuant to prayer in the complaint, a statutory three-judge court was immediately convened, 28 U.S.C.A. §§ 2281 and 2284, and the case heard as promptly as possible, inasmuch as plaintiff's employment was to begin September 19, 1966.

The oath sought to be exacted from plaintiff is as follows:

> "CERTIFICATION OF APPLICANT FOR PUBLIC EMPLOYMENT Required by Law (Art. 85A, Paragraph 13, Annotated Code of Maryland, 1957)
>
> "I, ... do hereby
> (Print Name—including middle initial)
> certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.

[2] Included among the defendants is J. Jerome Frampton, Jr., president of the Maryland State Board of Education. This board has no power with regard to the University of Maryland, the government of which is vested in its Board of Regents. 7 Annotated Code of Maryland (1965 Ed.), Article 77 § 249(e). The motion to dismiss will be granted as to this defendant for improper joinder.

"I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

Date .....

Signature .....
(Name—including middle initial)

In his complaint plaintiff alleges that the loyalty oath is unconstitutional, because it infringes on his First and Fourteenth Amendment rights, is so vague as to deny him due process, and equal protection of the laws, and constitutes a bill of attainder against him. Additionally, plaintiff obliquely alleged that the oath would deny him freedom of religion, but in argument plaintiff made no contention that any specific religious belief held by him was counter to the certification that he was asked to make.

Article 85A of the Annotated Code of Maryland was enacted in its entirety in 1949 and has never been amended. Of the provisions pertinent to this case, § 10 renders ineligible for employment by the state any person who is a "subversive" person as defined in this Article. Section 13 required state employees who were such on June 1, 1949, the effective date of the Act, to make a written statement, subject to the penalties of perjury, that he or she was not a "subversive" person as defined in Article 85A, and § 11 requires every department, board, commission or other agency of the State of Maryland or any political subdivision thereof in the appointment of new employees, to establish procedures, by rules, regulations or otherwise, to

ascertain that any employee "including teachers and other employees of any public educational institution in this state" is not a "subversive" person as defined in the Article. The Attorney General of Maryland, in reliance upon these sections, has expressed the view that persons rendering occasional instructional services to the University of Maryland as part of the formal instruction program are required to execute the loyalty oath pledge. 45 Opinions Attorney General 187 (1960).

The operative words "subversive person" are defined by § 1, which reads:

> "'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of subversive organization or a foreign subversive organization."

Because one is a "subversive person" if he is a member of a "subversive organization" or a "foreign subversive organization," the definitions of those terms, as set forth in § 1 of Article 85A, should also be stated. They are:

> "'Subversive organization' means any organization which engages in or advocates, abets, advises, or

teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, by revolution, force, or violence.

"'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of, the United States, or of the State of Maryland, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual; but does not and shall not be construed to mean an organization the bona fide purpose of which is to promote world peace by alliances or unions with other governments or world federations, unions or governments to be effected through constitutional means."

While plaintiff asserts a denial of his First and Fourteenth Amendment rights to freedom of speech and freedom of association as well as equal protection of the laws,

the first substantive issue we must decide is whether the oath is so broad, vague and indefinite that plaintiff has been denied due process of law. This is so because plaintiff's First and Fourteenth Amendment rights are not violated if the oath is valid under the due process clause; they have been violated only if the oath will not withstand the due process test. *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966).[3] Of course, the presence of First and Fourteenth Amendment rights buttresses the strictness of the due process requirement. We turn first to whether the oath is so broad, vague and indefinite as to deny due process of law.

The validity of Article 85A under state and federal law was sustained in the state courts in *Shub* v. *Simpson*, 197 Md. 282, 76 A.2d 332 (1950); *Hammond* v. *Lancaster*, 194

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[3] In the *Elfbrandt* case, the Arizona loyalty oath was held invalid because of its indefiniteness, i.e., its failure to require specific intent to subscribe to the unlawful ends of a subversive organization by one who has become a member thereof. The relationship between First and Fourteenth Amendment rights, on the one hand, and the due process requirement of definiteness, on the other, is demonstrated by the following extracts from the Court's opinion:

"This Act threatens the cherished freedom of association protected by the First Amendment, made applicable to the States through the Fourteenth Amendment. (• • • citing.)

• • • •

"'A statute touching those protected rights must be narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state.' Cantwell v. Connecticut, 310 U. S. 296, 311 • • • Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' • • •

"A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. • • • •" *Id.* at pp. 18-19.

Md. 462, 71 A.2d 474 (1950); and *Hammond* v. *Frankfeld*, 194 Md. 487, 71 A.2d 482 (1950). One of the parties in the *Shub* case sought further review in the Supreme Court of the United States, *Gerende* v. *Bd. of Supervisors of Elections*, 341 U. S. 56 (1951). Technically, the oath found to be valid in the *Gerende* case was the oath required of candidates for election by § 15 of Article 85A, while the oath to which plaintiff objects is the oath required by §§ 11 and 13 of Article 85A of state employees and appointed officers, but, since the oaths are identical in both situations, what the Supreme Court said in the *Gerende* case is determinative here. The Court affirmed the decision of the Maryland Court of Appeals in *Shub* v. *Simpson, supra*, saying:

> "We read this decision to hold that to obtain a place on a Maryland ballot a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt. —— Md. ——, at ——, 76 A.2d at 338. At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is affirmed." *Id.* at 56-57.

Thus, the Supreme Court in *Gerende* specifically approved of an oath that one is "not a person who is engaged in one way or another in the attempt to overthrow the government

by force or violence," and that "he is not knowingly a member of an organization engaged in such an attempt." The oath in the case at bar is precisely in the form upheld by the Supreme Court, except that it eliminates the part of the oath that he who makes it also certifies that he is "not knowingly a member of an organization engaged in such an attempt [overthrow of the government by force or violence]." In argument we were told that the latter certification was eliminated from the form of oath at the instance of the Attorney General on May 3, 1966, following the decision in *Elfbrandt* v. *Russell, supra* [decided April 18, 1966]. In the light of this flat holding in *Gerende,* we need only determine whether *Gerende* has been subsequently overruled or modified to decide plaintiff's first contention. Plaintiff asserts that *Gerende's* authority has been impaired by *Baggett* v. *Bullitt* and *Elfbrandt* v. *Russell, supra.*

In *Baggett* v. *Bullitt, supra,* loyalty oaths of the State of Washington, one applicable to teachers and the other applicable to all state employees, including teachers, were held invalid for vagueness. The oath required of all state employees, including teachers, is the significant oath for the case at bar. It required employees to swear that they were not a "subversive person" which was defined in terms identical to those under Article 85A § 1 to include one who "advocates, abets, advises or teaches by any means" another to commit or aid in the commission of any act intended to overthrow or alter, or to assist the overthrow or alteration of the constitutional form of government by revolution, force or violence. Insofar as a "subversive person" was one who was a member of a "subversive organi-

zation," the Washington definition included a limitation, absent in the Maryland definition, that membership be knowing. The Supreme Court held the "advocates, abets, etc." language invalid because it was lacking in terms susceptible of objective measurement and failed to inform what the state commanded or forbade.[4]

The *Baggett* case is clear authority that if Maryland required an oath in the precise language of the Maryland Subversive Activities Act of 1949, *supra,* such an oath would be invalid. The fact is, however, that the oath sought to be exacted from the plaintiff in the case at bar is less than that condemned in *Baggett* and, indeed, less than that approved in *Gerende.* While the dissenters in *Baggett* v. *Bullitt* expressed the view that *Gerende* had been overruled by the decision in *Baggett,* explaining the reasons for this conclusion in a footnote,[5] the majority answered by foot-

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[4] *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961), was relied on to support this result. There Florida required state employees, including teachers, to make oath that they, *inter alia,* had not lent "aid, support, advice, counsel or influence to the Communist Party." 368 U. S. at p. 279. The oath was held invalid because lacking in terms susceptible of objective measurement. In so deciding, the Court commented on the absence of language proscribing "advocacy of violent overthrow of state or federal government" and "membership or affiliation with the Communist Party, past or present." 368 U. S. at p. 286.

[5] "It has been contended that the crucial section of Maryland's Ober Act, that which is identical to the Washington Act, was not before the Court in Gerende, but a review of the record in that case conclusively demonstrates to the contrary. Further, while the Gerende opinion was stated with a qualification, the fact remains that the Court approved the judgment of the Maryland court and rejected the argument that the Act was unconstitutionally vague." *Id.* at p. 382.

note that *Gerende* was still good law.[6] In view of the statement by the majority we cannot read *Baggett* v. *Bullitt* as adversely affecting the portion of the holding in *Gerende* which approved the oath sought to be required of the plaintiff.

In *Elfbrandt* v. *Russell, supra,* the Arizona loyalty oath was held invalid. The language of the oath[7] as such did not appear to violate any constitutional fiat, but the legislature put a gloss on the oath by subjecting to a prosecution

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[6] "The contention that the Court found no constitutional difficulties with identical definitions of subversive person and subversive organizations in Gerende v. Board of Supervisors, 341 US 56, 95 L. ed. 745, 71 S. Ct. 565, is without merit. It was forcefully argued in Gerende that candidates for state office in Maryland were required to take an oath incorporating a section of the Maryland statutes defining subversive person and organization in the identical terms challenged herein. But the Court rejected this interpretation of Maryland law and did not pass upon or approve the definitions of subversive person and organization contained in the Maryland statutes. Instead it made very clear that the judgment below was affirmed solely on the basis that the actual oath to be imposed under Maryland law requires one to swear that he is not a person who is engaged 'in the attempt to overthrow the government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt." *Id.*, at 56-57, 95 L. ed. at 746 (emphasis in original). The Court said, "At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is Affirmed. Id. at 57, 95 L. ed. at 746." *Id.* at p. 368.

[7] "I, (type or print name), do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so help me God (or so I do affirm)."

for perjury and for discharge from public office anyone who took the oath and who "knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations," or "any other organization," having for one of its purposes the overthrow of the government of Arizona by force or violence, where the employee had knowledge of the unlawful purpose. The failure of the statutory gloss to require further that the prosecution and expulsion be conditioned upon a showing that the employee was an active member *with the specific intent of assisting in achieving the unlawful ends of an organization which had as one of its purposes the violent overthrow of the government* rendered the gloss invalid.

The decision is, of course, ample justification for the Attorney General of Maryland to have eliminated the portion of the Maryland oath approved in *Gerende* that a person is not knowingly a member of a subversive organization, and to that extent overruled the decision in *Gerende*. The majority opinion makes no mention of *Gerende*, but we cannot read *Elfbrandt* as overruling *Gerende* to any greater extent, notwithstanding the inability of the dissenters to square the holding with the holding in *Gerende* and other cases. In short, in both of the decisions rendered after *Gerende* which have been pressed on us by plaintiff, we cannot find that the portion of the holding in *Gerende* which permits an oath that a person is not engaged in one way or another in the attempt to overthrow the government by force or violence has been impaired.

Plaintiff argues that "in one way or another" is a phrase unconstitutionally vague, while defendants argue that "in

one way or another" means "any way" and is linked to the word "attempt," so as to express the concept of specific intent, coupled with an overt act, to overthrow the government by force or violence. We need not choose between these arguments. It suffices to say that the phrase "in one way or another" was specifically approved in *Gerende;* we cannot find that it has been overruled; and it is our duty to apply the rules laid down by the Supreme Court and not to anticipate its possible future decisions.

Plaintiff also argues that the oath sought to be exacted from him is not limited to the text stated in the opinion but, rather, extends to the full oath purportedly required by Article 85A. Alternatively, plaintiff argues that the Attorney General of Maryland is without authority to require only a portion of the oath required by Article 85A, but not all. The first portion of the argument rests upon the assertion that, in the certificate plaintiff was asked to execute, the reference to "Art. 85A, paragraph 13, Annotated Code of Maryland 1957" after the phrase "Required by law" means that the certification following, which, on its face, is limited to engaging in one way or another in the attempt to overthrow the government by force or violence, embodies aspects of the oath prescribed by statute which are clearly invalid under the Supreme Court decisions. We are not persuaded. The other portion of the argument rests in part on *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), which is cited as indicating that only a state court of the State of Maryland may properly determine whether the full oath prescribed by Article 85A can be severed into its valid and invalid provisions, and that it is our duty to enjoin the oath in its entirety until a state

court renders an appropriate judgment. This argument overlooks § 18 of Article 85A,[8] as clear an expression of severability as could be found. Moreover, as the chief legal officer of the State of Maryland, sworn to uphold the Constitution of the United States, as well as the Constitution and laws of the State of Maryland, Md. Constitution, Article I, § 6, the Attorney General acted properly within the scope of his authority in advising that those portions of the oath prescribed by Article 85A repugnant to decided cases of the Supreme Court of the United States should not be required of state employees, even in the absence of a specific court decree. We do not read the *Dombrowski* case as proscribing this conduct.

We consider next plaintiff's argument that the oath is a bill of attainder and conclude that this contention is without merit. Loyalty oaths, as conditions precedent for public employment, if otherwise valid, are not invalid as bills of attainder. *Garner* v. *Board of Public Works,* 341 U. S. 716, 722 (1951), held an oath of non-advocacy of violent overthrow of government required of municipal employees not punishment and hence not a bill of attainder. Even *Baggett* v. *Bullitt, supra,* which condemned a loyalty oath as unconstitutionally vague, recognized the right of a state "* * * to take proper measures safeguarding the public service from disloyal conduct" (p. 379). See also,

[8] "18. Severability.

"If any provision, phrase, or clause of this article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions, phrases or clauses or applications of this article which can be given effect without the invalid provision, phrase, or clause or application, and to this end the provisions, phrases and clauses of this article are declared to be severable."

Concurring Opinion of Sobeloff, Circuit Judge

American Communications Ass'n. v. *Douds,* 339 U. S. 382 (1950); *Adler* v. *Board of Education,* 342 U. S. 485 (1952); and *Keyishian* v. *Board of Regents,* —— F. S. —— (W.D. N.Y. 1966), prob. jur. noted, 384 U. S. 998 (1966). *Speicer* v. *Randall,* 357 U. S. 513 (1958), is not to the contrary as the discussion of that case in *Konigsberg* v. *State Bar of California,* 366 U. S. 36, 53-56 (1961), demonstrates.

Under existing law, we do not find the oath tendered to plaintiff invalid. We conclude that the complaint should be dismissed. The Clerk will enter an order to that effect.

(see separate concurrence)
United States Circuit Judge

HARRISON L. WINTER
United States Circuit Judge

ROSZEL C. THOMSEN
Chief Judge,
United States District Court
for the District of Maryland

SOBELOFF, *Circuit Judge,* concurring:

In joining my brethren in the disposition of this case I wish to add a brief statement of my reasons.

Whether the ritual of an oath or affirmation of loyalty, with or without sanctions for perjury, is a wise or effective means to the unquestionably legitimate end of protecting the state against subversion is not the issue before us. The question is the legality of the particular requirement demanded of the plaintiff, not its desirability.

Concurring Opinion of Sobeloff, Circuit Judge

I am inclined to agree with the plaintiff that the prescribed oath or statement is not to be judged in isolation, but in conjunction with the statute, for in the absence of a statute, there would be no authority for demanding any statement "under penalty of perjury." If it were not for *Gerende* v. *Board of Supervisors,* 341 U. S. 56 (1951), I would not lightly dismiss the plaintiff's argument that the reference to Article 85a, with its language about "subversive persons" and "subversive organizations," has a material bearing on the question before us, even though the oath itself does not expressly embody these terms. But the question comes to us freighted with a history, and the role of the statute in respect to the oath has been authoritatively interpreted.

In *Gerende* the Court upheld an oath which was in terms more comprehensive than the one before us. The Court embraced what it regarded as a restrictive interpretation of the Ober Law by the Maryland Court of Appeals, and upon that premise, and upon the condition that the Attorney General would advise the state authorities to accept as sufficient an affidavit in the narrow terms stipulated by the court, sustained the statute and the affidavit pursuant thereto. Whatever we might otherwise have thought, the Supreme Court has authoritatively decided that the broader language of the statute, which concededly would make it invalid, see *Baggett* v. *Bullitt,* 377 U. S. 360 (1964), is not controlling, but the less comprehensive language of the oath, as directed by the Attorney General, governs.

The plaintiff maintains first that the Supreme Court was mistaken in its analysis of the decision of the Maryland Court of Appeals in *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d

332 (1950), and he further points to the logic employed in the later holdings in *Baggett* v. *Bullitt, supra,* and *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966), in support of his thesis that the Court must sooner or later disavow *Gerende.*

I acknowledge the force of the plaintiff's arguments as to the doubts concerning the present status of *Gerende* created by the recent decisions of the Supreme Court.[1] It may well be that on renewed consideration the Supreme Court would today hold the statute and the oath, even as recently further modified by the Attorney General, too vague to meet constitutional standards. However, it is one thing for a lower court to project an estimate of the future course of Supreme Court decisions on a point not theretofore specifically ruled upon; it is quite another to assume that an earlier decision of the Supreme Court on the very question now pending before the inferior tribunal has been overruled *sub silentio.* Judicial discipline requires that such assumptions be not too freely made, especially when the Supreme Court seems to have been careful to avoid an outright overruling. If *Gerende* is ripe for final dispatch, the task is for the Supreme Court, not a subordinate court.

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[1] Keyishian v. Board of Regents, —— F. Supp. —— (W. D. N. Y. Jan. 5, 1966), prob. juris. noted, 384 U. S. 998 (1966), decided prior to the Supreme Court's decision in *Elfbrandt,* may be distinguishable from the case at bar. There is no New York equivalent to the "loyalty pledge" subject to penalties for perjury, that is before us today. Furthermore, as the three-judge district court emphasized, New York State, in requiring of a prospective employee the assurance that he has complied with the laws under attack in *Keyishian,* affords the applicant an opportunity to be heard, should he be in doubt as to the coverage of the statutes.

Concurring Opinion of Sobeloff, Circuit Judge

Thus, despite the doubts engendered by the course of subsequent adjudications, I think the contentions made by the plaintiff here are more properly addressed to the Supreme Court. I am obliged, therefore, to join in today's order of dismissal rather than anticipate the abandonment of *Gerende*.

SIMON E. SOBELOFF
U. S. Circuit Judge

Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

[SAME TITLE]

Defendants' motion to dismiss having come on for hearing, briefs having been filed, argument having been heard, and the matter considered, it is, this eighth day of September, 1966, by the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND,

ORDERED, that defendants' motion to dismiss be, and it is hereby, granted, and said complaint is dismissed, with costs to defendants.

SIMON E. SOBELOFF
United States Circuit Judge

HARRISON L. WINTER
United States Circuit Judge

ROSZEL C. THOMSEN
Chief Judge
United States District Court
for the District of Maryland

Maryland Subversive Activities Act of 1949

Article 85A

ANNOTATED CODE OF MARYLAND (1957)
SEDITION AND SUBVERSIVE ACTIVITIES

§ 1. *Definitions.*

For the purposes of this article:

"Organization" means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

"Subversive organization" means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, by revolution, force, or violence.

"Foreign subversive organization" means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of, the United States, or of the

State of Maryland, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual; but does not and shall not be construed to mean an organization the bona fide purpose of which is to promote world peace by alliances or unions with other governments or world federations, unions or governments to be effected through constitutional means.

"Foreign government" means the government of any country or nation other than the government of the United States of America or of one of the states thereof.

"Subversive person" means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization. (An. Code, 1951, § 1; 1949, ch. 86, § 1.)

SEDITION

§ 2. *Unlawful acts.*

It shall be a felony for any person knowingly and wilfully to:

(a) Commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or

(b) Advocate, abet, advise, or teach by any means any person to commit, attempt to commit, or assist in the commission of any such act under such circumstances as to constitute a clear and present danger to the security of the United States, or of the State of Maryland or of any political subdivision of either of them; or

(c) Conspire with one or more persons to commit any such act; or

(d) Assist in the formation or participate in the management or to contribute to the support of any subversive organization or foreign subversive organization knowing said organization to be a subversive organization or a foreign subversive organization; or

(e) Destroy any books, records or files, or secrete any funds in this State of a subversive organization or a foreign subversive organization, knowing said organization to be such.

Any person who shall be convicted by a court of competent jurisdiction of violating any of the provisions of this section shall be fined not more than twenty thousand dollars, ($20,000), or imprisoned for not more than twenty (20) years, or both, at the discretion of the court. (An. Code, 1951, § 2; 1949, ch. 86, § 2.)

Maryland Subversive Activities Act of 1949

§ 3. *Membership in subversive organization.*

It shall be a felony for any person after June 1, 1949 to become, or after September 1, 1949 to remain a member of a subversive organization or a foreign subversive organization knowing said organization to be a subversive organization or foreign subversive organization. Any person who shall be convicted by a court of competent jurisdiction of violating this section shall be fined not more than five thousand dollars ($5,000), or imprisoned for not more than five (5) years, or both, at the discretion of the court. (An. Code, 1951, § 3; 1949, ch. 86, § 3.)

§ 4. *Effect of conviction.*

Any person who shall be convicted by a court of competent jurisdiction of violating any of the provisions of §§ 2 and 3 of this article, in addition to all other penalties therein provided, shall from the date of such conviction be barred from:

(a) Holding any office, elective or appointive, or any other position of profit or trust in or employment by the government of the State of Maryland or of any agency thereof or of any county, municipal corporation or other political subdivision of said State;

(b) Filing or standing for election to any public office in the State of Maryland; or

(c) Voting in any election held in this State. (An. Code, 1951, § 4; 1949, ch. 86, § 4.)

§ 5. *Dissolution of organizations.*

It shall be unlawful for any subversive organization or foreign subversive organization to exist or function in the State of Maryland and any organization which by a court of competent jurisdiction is found to have violated the provisions of this section shall be dissolved, and if it be a corporation organized and existing under the laws of the State of Maryland a finding by a court of competent jurisdiction that it has violated the provisions of this section shall constitute legal cause for forfeiture of its charter and its charter shall be forfeited under the provisions of Article 23, §§ 104-108, inclusive, Annotated Code of Maryland [1939 Code] and all funds, books, records and files of every kind and all other property of any organization found to have violated the provisions of this section shall be seized by and for the State of Maryland, the funds to be deposited in the State treasury and the books, records, files and other property to be turned over to the Attorney General of Maryland. (An. Code, 1951, § 5; 1949, ch. 86, § 5.)

§ 6. *Special assistant attorney general—Appointment, salary and supervision.*

The Attorney General of Maryland is hereby authorized and directed to appoint an additional assistant to perform the duties of special assistant attorney general in charge of subversive activities whose annual salary shall be provided in the budget, and whose responsibility it shall be, under supervision of the Attorney General, to assemble, arrange and deliver to the State's attorney of any county or of Baltimore City, together with a list of necessary

witnesses, for presentation to the next grand jury to meet in said county or city, all information and evidence of matters within said county or Baltimore City which have come to his attention, relating in any manner to the acts prohibited by this article, and relating generally to the purposes, processes and activities of communism and any other or related subversive organizations, associations, groups or persons. (An. Code, 1951, § 6; 1949, ch. 86, § 6.)

§ 7. *Same—Assistance in collection of evidence and information.*

For the collection of any evidence and information referred to in this article, the Attorney General is hereby directed to call upon the Superintendent of State Police, the police commissioner of Baltimore City and other county and municipal police authorities of the State to furnish to the special assistant hereinbefore provided for, such assistance as may from time to time be required. Such police authorities are directed to furnish information and assistance as may be from time to time so requested. The special assistant attorney general herein provided for may testify before any grand jury as to matters referred to in this article as to which he may have information. (An. Code, 1951, § 7; 1949, ch. 86, § 7.)

§ 8. *Same—Records and reports.*

The Attorney General shall require the special assistant herein provided for, to maintain complete records of all information received by him and all matters handled by him under the requirements of this article. Such records as may reflect on the loyalty of any resident of this State,

shall not be made public or divulged to any person except with permission of the Attorney General to effectuate the purposes of this article. He shall further require the publication, printing and appropriate distribution of all reports of grand juries of this State made as hereinafter provided. The Attorney General shall include in his budget estimates, adequate moneys for the printing and distribution of the said reports, and for all other expenses of administering this article. To the extent that his time may not be required in his duties under this article, the special assistant attorney general shall be available for and perform such other duties as may be assigned to him by the Attorney General. - (An. Code, 1951, § 8; 1949, ch. 86, § 8.)

§ 9. *Duty of judges as to grand jury.*

The judge of the criminal court of each county and of Baltimore City, when in his discretion it appears appropriate, or when informed by the State's attorney that there is information or evidence of the character described in § 6 of this article to be considered by the grand jury, shall charge the grand jury to inquire into violations of this article for the purpose of proper action, and further to inquire generally into the purposes, processes and activities and any other matters affecting communism or any related or other subversive organizations, associations, groups or persons. Any grand jury charged by the court as provided herein shall not later than the conclusion of its term of service prepare a written report, separate from all other matters considered by said grand jury, of its findings upon the subjects placed before it under the requirements of this article, provided, however, such report shall not

charge any residents of this State with being disloyal unless they shall have been indicted under the provisions of this article or other provisions of the criminal law of this or some other jurisdiction. (An. Code, 1951, § 9; 1949, ch. 86, § 9.)

LOYALTY

§ 10. *Subversive person not eligible for governmental office.*

No subversive person, as defined in this article, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government of, or in the administration of the business of this State, or of any county, municipality, or other political subdivision of this State. (An. Code, 1951, § 10; 1949, ch. 86, § 10.)

§ 11. *Rules and regulations to determine loyalty—In general.*

Every person and every board, commission, council, department, court or other agency of the State of Maryland or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain before any person, including teachers and other employees of any public educational institution in this State, is appointed or employed, that he or she as the case may be, is not a subversive person, and that there are no reasonable grounds to believe such persons are subversive persons. In the event such reasonable grounds exist, he or she as the case may be shall not be appointed or em-

ployed. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. (An. Code, 1951, § 11; 1949, ch. 86, § 11.)

§ 12. *Same—Not applicable to laborers.*

The inquiries prescribed in § 11, other than the written statement to be executed by an applicant for employment, shall not be required as a prerequisite to the employment of any persons in the classification of laborers in any case in which the employing authority shall in his or its discretion determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of persons as to whom there may be reasonable grounds to believe that they are subversive persons as defined in this article will not be dangerous to the health of the citizens or the security of the governments of the United States, the State of Maryland, or any political subdivision thereof. (An. Code, 1951, § 12; 1949, ch. 86, § 12.)

§ 13. *Statement of employees.*

Every person, who on June 1, 1949 shall be in the employ of the State of Maryland or of any political subdivision thereof, other than those now holding elective office shall be required on or before August 1, 1949, to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this article, namely, any person who

commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this article. Such statement shall be prepared and execution required by the State Commissioner of Personnel for all persons whose employment is subject to the provisions of Article 64A of the Annotated Code of Maryland and by the city service commission of Baltimore for all employees whose employment is subject to the provisions of §§ 142 to 156 of the Baltimore City Charter and by every person and every board, commission, council, department, court or other agency of the State of Maryland or any political subdivision thereof responsible for the supervision of other employees, for employees under its jurisdiction. Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this article shall immediately be discharged. (An. Code, 1951, § 13; 1949, ch. 86, § 13; 1953, ch. 310.)

§ 14. *Discharge from office.*

Reasonable grounds on all the evidence to believe that any person is a subversive person, as defined in this article, shall be cause for discharge from any appointive office or other position of profit or trust in the government of or

in the administration of the business of this State, or of any county, municipality or other political subdivision of this State, or any agency thereof. The State Commissioner of Personnel and the civil service commission of Baltimore shall, by appropriate rules or regulations, prescribe that persons charged with being subversive persons, as defined in this article, shall be accorded notice and opportunity to be heard, in accordance with the procedures prescribed by law for discharges for other reasons. Every person and every board, commission, council, department, or other agency of the State of Maryland or any political subdivision thereof having responsibility for the appointment, employment or supervision of public employees not covered by the classified service in this section referred to, shall establish rules or procedures similar to those required herein for classified services for a hearing for any person charged with being a subversive person, as defined in this article, after notice and opportunity to be heard. Every employing authority discharging any person pursuant to any provision of this article shall promptly report to the special assistant attorney general in charge of subversive activities the fact of and the circumstances surrounding such discharge. A person discharged under the provisions of this section shall have the right to appeal to the circuit court of the county or to the Baltimore City court wherein such person may reside for a determination by such court (with the aid of a jury, if the appellant so elects) as to whether or not the discharge appealed from was justified under the provisions of this article. The court shall speedily hear and determine such appeals, and from the judgment of the court, there shall be a further appeal to the

Court of Appeals of Maryland as in civil cases. (An. Code, 1951, § 14; 1949, ch. 86, § 14; 1953, ch. 310; 1962, ch. 36, § 54.)

§ 15. *Statements of candidates for office.*

No person shall become a candidate for election under the provisions of Article 33 of the Annotated Code of Maryland to any public office whatsoever in this State, unless he or she shall file with the certificate of nomination required by the foregoing Article 33, an affidavit that he or she is not a subversive person as defined in this article; provided that, in the case of certificates of nomination for President or Vice-President of the United States, the affidavit may be made on behalf of such candidates by those persons who file the certificate of nomination for such candidates. No certificate of nomination shall be received for filing by any board of supervisors of elections or by the Secretary of State of Maryland unless accompanied by the affidavit aforesaid, and there shall not be entered upon any ballot or voting machine at any election the name of any person who has failed or refused to make the affidavit aforesaid. (An. Code, 1951, § 15; 1949, ch. 86, § 15.)

§ 16. *Statement of private institution of learning before receiving public funds.*

Before any appropriation of public funds of any character shall be made by the State of Maryland to any private institution of learning, there shall be filed with the Governor, the President of the Senate and the Speaker of the House of Delegates, on behalf of said institution, a written report setting forth what procedures it has adopted to de-

termine whether it has reasonable grounds to believe that any subversive persons are in its employ, and what steps, if any, have been or are being taken to terminate such employment. In the absence of such a report no appropriation shall be included in the State budget or approved by the General Assembly. (An. Code, 1951, § 16; 1949, ch. 86, § 16.)

§ 17. *False statements constitute perjury.*

Every written statement made pursuant to this article by an applicant for appointment or employment, or by any employee, shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who makes a material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this article, or (c) under oath in any hearing conducted by any agency of the State, or of any of its political subdivisions, pursuant to this article, or (d) in any written statement by an applicant for appointment or employment or by an employee in any State aid or private institution of learning in this State, intended to determine whether or not such applicant or employee is a subversive person as defined in this article, which statement contains notice that it is subject to the penalties of perjury, shall be subject to the penalties of perjury prescribed in Article 27, § 439 of the Annotated Code. (An. Code, 1951, § 17; 1949, ch. 86, § 17.)

§ 18. *Severability.*

If any provision, phrase, or clause of this article or the application thereof to any person or circumstance is held

invalid, such invalidity shall not affect other provisions, phrases, or clauses or applications of this article which can be given effect without the invalid provision, phrase, or clause or application, and to this end the provisions, phrases and clauses of this article are declared to be severable. (An. Code, 1951, § 18; 1949, ch. 86, § 18.)

§ 19. *Short title.*

This article may be cited as the Subversive Activities Act of 1949. (An. Code, 1951, § 19; 1949, ch. 86, § 19.)

CERTIFICATION OF APPLICANT FOR PUBLIC EMPLOYMENT

Required by Law (Art. 85A, Paragraph 13, Annotated Code of Maryland, 1957)

"I, ..., do hereby
(Print Name—including middle initial)
certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.

"I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

Date .....

Signature .....
(Name—including middle initial)

Press Release

May 3, 1966

THOMAS B. FINAN, *Attorney General*

I had the privilege today to meet with the Honorable Frank B. Ober, Chairman of the Commission which drafted the original loyalty oath act which bears his name. My office has prepared a new form of loyalty pledge which both, Mr. Ober and I, feel complies with the most recent decision of the United States Supreme Court in the case of *Elfbrandt* v. *Russell,* which pertained to the loyalty oath in use in the State of Arizona.

Heretofore, this office had prescribed language for use in the oath which complied with the opinion of the Court of Appeals of Maryland in *Gerende* v. *Board of Supervisors of Elections* and which was sustained by an unanimous decision of the United States Supreme Court (1951).

The new form of the oath will contain a slight modification and will read as follows:

> "I, ... do hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
>
> I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

I think, and Mr. Ober agrees, that this pledge strikes at the methods and means used by subversive groups who, from time to time, have demonstrated their efforts and intent to destroy our Government by force or violence.